Supreme Court, U.S.
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No. 94-1664

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STACEY C. KOON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Amicus Curiae the National Association of Criminal Defense Lawyers ("NACDL") submits this brief in support of Stacey C. Koon's petition for a writ of certiorari with respect to the appropriate standard of appellate review of a district court's decision to depart from the United States Sentencing Guidelines (the "Guidelines") in the "unusual" or "atypical" case.

The NACDL is a national organization of over 8,000 criminal defense attorneys who practice in the federal and state courts. The NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to the area of criminal defense and thus speaks for more than 28,000 criminal defense lawyers nationwide. Its members come from every state in the United States, as well as from Puerto Rico, the Virgin Islands, Guam and several foreign countries. The NACDL was formed in 1958 exclusively for charitable, scientific, educational and legislative purposes. Among other things, the NACDL seeks to promote the study of and research in the field of criminal defense law and procedure and constitutional law, to advance the knowledge of the law as it relates to the practice of criminal defense, to promote the proper and fair administration of criminal justice, to preserve, protect and defend the adversary system of justice and the Constitution, to maintain and foster an independent and able criminal defense bar, and to ensure justice and due process for persons accused of committing crimes.

The interest of the NACDL as *amicus curiae* in this case is limited to the issue of the appropriate standard of appellate review of a sentencing court's decision to depart from the Guidelines on the ground that unusual circumstances exist that permit departure. While the

NACDL certainly does not condone the activities for which petitioner Stacey C. Koon was charged and convicted, it believes that he, like any other citizen, is entitled to elemental fairness in the application of the law. Thus, the NACDL urges the Court to grant the petition for certiorari in order to establish a uniform standard of limited appellate review that will give substantial deference to a sentencing court's decision that circumstances exist that are of a "kind" or "degree" that warrant a departure from the Guidelines offense level. *See* 18 U.S.C. § 3553(b).[1] Given the frequency with which district courts are faced with applications for departures, both downward and upward, the standard of review is of significant importance to federal judges, defendants, defense attorneys, and prosecutors.

The written consent of both parties to this case, petitioner Koon and respondent United States, has been obtained for the filing of this petition.[2]

REASON FOR GRANTING THE WRIT

The Ninth Circuit's decision to vacate the district court's downward departures in this case is based upon an

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[1] The NACDL, although it has not briefed the issue, also requests that the Court reexamine the "dual sovereignty" exception to the double jeopardy clause and consider whether successive prosecutions in state and federal forums violates the Constitution.

[2] Accompanying this brief are Letters from Drew S. Days, III, Solicitor General, on behalf of the government, and Theodore B. Olson of Gibson, Dunn & Crutcher, on behalf of petitioner Koon, consenting to the filing of a brief *amicus curiae* by the NACDL.

impermissibly restrictive view of a sentencing court's authority to depart from the Guidelines. While the NACDL does not suggest that the district court should have unfettered discretion in applying the Guidelines with respect to departures, it does believe that district courts should retain, at a minimum, the degree of flexibility suggested by *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993) (Breyer, J.). Thus, the NACDL urges a standard of limited appellate review that will pay substantial deference to a sentencing court's determination of "'unusualness' with 'full awareness of, and respect for, the trier's superior "feel"' for the case.'" *United States v. Rivera*, 994 F.2d at 952 (quoting *United States v. Diaz-Villafane*, 874 F.2d 43, 50 (1st Cir.), *cert. denied*, 493 U.S. 862, 110 S. Ct. 177 (1989)).

The district court's familiarity with, and "superior feel" for, the particular case before it calls for the adoption of a narrow scope of appellate review of a sentencing court's departure decision. This same rationale underlies the standard of limited appellate review with respect to a district court's evidentiary decisions. Just as a district court's decisions involving evidentiary matters are given "substantial deference" because it, as opposed to an appellate court, has a better "feel" for the case from having participated in the proceedings that moved step-by-step toward the disposition that prompted the challenge on appeal, so too does a district court have a "superior feel" for an "unusual" or "atypical" case with respect to sentencing. *See, e.g., Bradley v. Secretary of Dept. of Health & Human Services*, 991 F.2d 1570 (Fed. Cir. 1993) (fact-finder has broad discretion in evidentiary determinations); *May v. Arkansas Forestry Com'n*, 993 F.2d 632, 637 (8th Cir. 1993) (appellate court must give "substantial deference" to district court's evidentiary rulings); *Gracia v. Lee*, 976 F.2d 1344, 1345 (10th Cir.

1992) (district court accorded "considerable deference" in evidentiary matters); *Adams v. Sewell*, 946 F.2d 757, 768 (11th Cir. 1991) (district court accorded "great discretion" in evidentiary rulings); *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 601 (9th Cir. 1991) ("broad discretion" accorded district court's evidentiary determinations); *cf. Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331 (1983) ("A magistrate's 'determination of probable cause should be paid great deference by reviewing courts,'" quoting *Spinelli v. United States*, 393 U.S. 410, 413, 89 S. Ct. 584, 590 (1969)).

Further, a sentencing court has a special competence and expertise in determining whether the particular case before it is "unusual" or "atypical" because it, unlike an appellate court, is "likely to have seen more *ordinary* Guidelines cases, for appellate courts hear only the comparatively few cases that counsel believe present a colorable appeal." *Rivera*, 994 F.2d at 951. Thus, the deference that should be accorded a sentencing court's decision on departure matters in the unusual case is simply an acknowledgment that district courts generally are in the best position to recognize atypical cases. *See Rivera*, 994 F.2d at 950.

The NACDL does not believe that the adoption of a standard of limited appellate review would result in a rash of departures by sentencing courts as a means to avoid the dictates of the Guidelines, nor does it believe that more downward departures necessarily would be upheld than upward departures.[3] A uniform standard of limited

[3] According to the latest (1993) Annual Report of the Sentencing Commission, the vast majority of sentences are imposed within the Guidelines' range. According to that Report, 75.3% of defendants nationwide are sentenced within the Guidelines range, 6.6% receive downward departures (not including 16.9% who receive downward departures for substantial assistance to the prosecution), while 1.1% receive upward departures. *See* U.S. Sentencing Commission FY 1993 Data File, Appendix B, 1993 Annual Report of United States Sentencing Commission. In the Ninth Circuit, the Circuit from which this matter comes, 76.98% of defendants are sentenced within the Guidelines range, while 8.09% receive downward departures (not including the 13.57% who receive downward departures based upon substantial assistance), and 1.36% receive upward departures. In the First Circuit, 79.18% of defendants are sentenced within the Guidelines range, while 5.26% receive downward departures (not including 13.52% based upon substantial assistance), and 2.0% receive upward departures. Since *Rivera* was decided in 1993 and *Koon* in 1994, it is doubtful that any conclusion about the effect of a different scope of review could be reached from these statistics.

appellate review, however, would lead, we believe, some district judges to be less hesitant to depart from the Guidelines in an "unusual" case.

The NACDL supports a deferential standard of limited appellate review as suggested by *Rivera* rather than a more rigid standard that would have the effect of placing a "straitjacket" on a sentencing court, "compelling it to impose sentences like a robot inside a Guidelines' glass bubble, preventing it from exercising discretion, flexibility or independent judgment.'" *United States v. Jagmohan*, 909 F.2d 61, 65 (2d Cir. 1991) (quoting *United States v. Lara*, 905 F.2d 599, 604 (2d Cir. 1990)).

In its support of such a limited scope of appellate review, the NACDL does not contend that the standard suggested by *Rivera* is necessarily the one that the Court should adopt. It does believe, however, that the limited scope of review suggested by *Rivera* is reasonable and properly recognizes the experience and special competence

of sentencing courts to view the particular factors in each case, singly or in combination, in terms of the gestalt of the entire case. As recognized by *Rivera*, it is the sentencing court's unique position--its experience and special competence with respect to the particular case--that permit it to impose a just and equitable sentence, the goal of the Sentencing Commission in formulating the Guidelines. *Rivera*, 994 F.2d at 951-52. As the title "Guidelines" itself implies, the Guidelines should be a guide, not a set of commandments, for the sentencing court to follow when determining the appropriate sentence.

A uniform discretionary standard of limited appellate review of departure decisions would be consistent with the spirit and the letter of the Guidelines while requiring an appellate court to give due respect to a sentencing court's departure decision "in a spirit of humility occasioned by not having participated in what has gone before." *Founding Church of Scientology of Wash. D.C., Inc. v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir.) (applying discretionary standard to district court's evidentiary decisions), *cert. denied*, 484 U.S. 871, 108 S. Ct. 199 (1986).

CONCLUSION

For the foregoing reasons, the NACDL respectfully requests that the Court grant petitioner Koon's application for certiorari and, upon hearing this matter, establish a uniform standard of limited appellate review of district court decisions to depart from the Guidelines in the "unusual" or "atypical" case.

June 19, 1995

Respectfully submitted,

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